STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2006
v	No. 262084 Monroe Circuit Court
CHAD CURTIS WHITE, Defendant-Appellant.	LC No. 04-033882-FC

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of armed robbery, MCL 750.529. The conviction arose from the robbery of a bank. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to nineteen to fifty years' imprisonment for the conviction. We affirm.

Defendant first argues that the prosecutor engaged in misconduct by commenting during his opening statement and eliciting testimony from the arresting officer, Donald Brady, that defendant was in a high-speed chase with police immediately before his arrest. Defendant contends that this evidence amounted to improper "other-acts evidence" and that the prosecutor was required to file, before trial, a notice of intent under MRE 404(b)(2) in order to introduce the evidence. We disagree.

Because defendant failed to properly preserve his claims of prosecutorial misconduct, our review is for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A "prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Ackerman, supra* at 448.

To be admissible under MRE 404(b)(1), other-acts evidence must be offered for a proper purpose, i.e., to prove something other than a character or propensity theory, and it must be relevant under MRE 402, as enforced through MRE 104(b). *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Moreover, the evidence's probative

value must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 75. Further, "the trial court, upon request, may provide a limiting instruction under Rule 105." *Id*. MRE 404(b)(2) requires a prosecutor to file a notice of intent, unless good cause is shown, to introduce evidence of "other crimes, wrongs, or acts."

However, evidence of the res gestae of a crime is admissible without regard to MRE 404(b). *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996). "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Id*. at 742 (internal citation and quotation marks omitted).

Here, the record reveals that Brady's testimony set forth the circumstances leading up to defendant's arrest. Brady testified that defendant attempted to elude police officers during an extended chase through Monroe and onto the I-75 expressway. While the police were in pursuit of defendant, he failed to stop his vehicle or obey the officers' commands. Brady testified that he activated his sirens and flashers while pursuing defendant and that defendant ran multiple stop signs, reached speeds of up to one-hundred miles an hour, and drove the wrong way on one-way streets. Further, the evidence revealed that police officers were required to block defendant's vehicle to arrest defendant and that a taser was used to subdue defendant during his arrest. The vehicle involved in the chase turned out to match the description of a vehicle that was parked near the entrance to the bank immediately before the robbery. Items found in the vehicle were also consistent with the circumstances surrounding the robbery. We conclude that, even though the high-speed chase occurred two days after the robbery, the evidence about the chase was so "blended or connected with the crime of which defendant [was] accused," *id.*, that it fell under the res gestae exception to MRE 404(b), as explained in *Sholl*, *supra* at 740-742. Thus, there was no need for the prosecutor to provide defendant with the notice required by MRE 404(b)(2). Moreover, because the evidence was relevant to the charged offense, "no basis exists to conclude that the prosecutor offered this evidence in bad faith." *Ackerman*, *supra* at 448. Accordingly, defendant has failed to establish plain error.

Defendant also argues that the prosecutor engaged in misconduct by presenting defendant's videotaped confession in which he stated that he used the money that was stolen from the bank to buy "crack cocaine" and that the white Buick driven by defendant was stolen. However, a prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Ackerman*, *supra* at 448. Clearly, defendant's confession to the charged offense was relevant to the prosecution's case. The fact that the prosecutor presented defendant's own statements in which he indicated that he used the money to buy drugs and that the white Buick used in the police chase was stolen did not deny defendant a fair trial. Accordingly, defendant has failed to establish plain error.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to: (1) object to the aforementioned "other-acts" evidence; (2) seek suppression of a tainted in-court identification; (3) present an expert witness to testify that defendant's confession was false; and (4) present an expert to testify regarding the inherent unreliability of eyewitness testimony and request a special cautionary jury instruction. We disagree.

Because defendant failed to move for a new trial or a *Ginther*[1] hearing below, our review is limited to facts contained in the lower court record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The determination whether a defendant has been deprived of the effective assistance of counsel "presents a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error and its constitutional determinations de novo. *Id*.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant must show "(1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that [the] defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). A defendant must also overcome a presumption that the challenged action constituted sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that defense counsel was ineffective for failing to object to the "other-acts" evidence under MRE 404(b). However, a defense attorney is not ineffective for failing to object to admissible evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In light of our conclusion that the challenged evidence was admissible, defense counsel was not ineffective for failing to object. Nor has defendant proved that counsel's failure to accept a limiting instruction from the trial court constituted unsound trial strategy. Indeed, counsel may have wished to avoid highlighting the evidence in question.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to move to suppress the identification of defendant by the victim, Rebecca Wyatt, on the grounds that it was tainted by an impermissibly suggestive photographic lineup and by an impermissibly suggestive confrontation at defendant's preliminary examination. Defendant contends that Wyatt's in-court identification testimony would have been suppressed had defense counsel moved to suppress it. We disagree.

"A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The fairness of an identification procedure is evaluated viewing the totality of the circumstances. *Id.* The test is whether the "totality of the circumstances" shows the identification to be reliable. *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985).

Here, under the totality of the circumstances, there is nothing in the record to show that there was anything suggestive regarding Wyatt's identification of defendant at the preliminary examination. Further, there is nothing to suggest that the photographic lineup was impermissibly suggestive. Defendant's contention that he was denied the effective assistance of counsel rests solely on the fact that Wyatt mistakenly identified defendant as a "dark-skinned, Hispanic male"

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

with facial hair in her initial written statement and during the photographic lineup. However, Wyatt positively identified defendant at trial and from the photographic stills taken from the video surveillance tapes inside the bank. Wyatt's identification of another man as the perpetrator in a prior lineup presented an issue of credibility that was properly resolved by the jury. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000) ("[t]he credibility of identification testimony is a question for the trier of fact . . . .") A defense attorney is not ineffective for failing to make a meritless motion or a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Because there was nothing suggestive in the identification procedure at the preliminary examination or at the photographic lineup, defense counsel was not ineffective for failing to move to suppress Wyatt's testimony.

Moreover, the record reveals that defense counsel attacked the credibility of the photographic lineup procedure through cross-examination of Detective Jeff Pauli and challenged Wyatt's testimony by comparing her physical description of defendant in her initial written statement to defendant's actual height and appearance. In light of defense counsel's actions and the overwhelming evidence presented by the prosecution, defendant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had Wyatt's testimony been suppressed. *Walker, supra* at 545.

Defendant next argues that counsel was ineffective because he failed to call an expert witness to testify regarding why defendant's confession may have been unreliable or coerced. We disagree.

Based on the limited record presented, defendant has failed to overcome the presumption that defense counsel's decision not to call an expert witness was trial strategy. "Counsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment." *Ackerman, supra* at 455. Moreover, there is no indication in the lower court record that defendant's confession was coerced or unreliable. Additionally, defendant offers no proof that an expert witness would have testified favorably to the defense if called by defense counsel. "Accordingly, defendant has not established the factual predicate for his claim," i.e., defendant has not established a reasonable probability that but for defense counsel's failure to call an expert witness, the result of the proceedings would have been different. *Ackerman, supra* at 455-456. Therefore, we conclude that defendant has failed to establish that counsel was ineffective.

Defendant next argues that defense counsel was ineffective for failing to: (1) call an expert witness to testify regarding the inherent unreliability of eyewitness identification and (2) request a special cautionary jury instruction. We disagree.

In *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999), this Court rejected a claim of ineffective assistance of counsel based on trial counsel's failure to "present expert psychological testimony about how the circumstances of the incident could have impaired [the victim's] perception, memory, and ability to recognize the [defendant]." There, the defendant challenged the victim's identification of the defendant as the perpetrator at: (1) the time of the charged offenses; (2) a pre-trial "live" lineup; and (3) trial. *Id*. at 646-648. The *Cooper* Court concluded that the defendant failed to overcome the presumption that the alleged error in failing to present expert testimony was trial strategy, reasoning that "[t]rial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony

that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *Id*. at 658.

In the present case, defendant has failed to overcome the presumption that defense counsel exercised sound trial strategy in failing to present an expert witness to testify regarding why Wyatt's identification of defendant was "inherently unreliable." As discussed earlier, the record reveals that defense counsel effectively cross-examined Wyatt regarding the discrepancies in her identification of defendant. Defense counsel may have concluded that an expert witness would have been cumulative to defendant's defense or that the jury recognized that "memories and perceptions are sometimes inaccurate." *Cooper, supra* at 658. "[T]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Furthermore, there is nothing in the lower court record to suggest that a special cautionary instruction regarding the inherent unreliability of eyewitness testimony was required to be given. A defendant has a right to a properly instructed jury, but the evidence must support a particular instruction. *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000). The record reveals that defense counsel requested and the trial court gave the standard jury instructions, including CJI2d 7.8. The standard jury instructions were designed for the specific purpose of avoiding the potential problems of misidentification. Therefore, we conclude that defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness. *Walker, supra* at 545. Accordingly, defendant has failed to show that defense counsel was ineffective.

Defendant finally argues that the cumulative effect of the errors requires that we reverse his conviction and grant him a new trial. However, because we conclude that defendant failed to establish error, there can be no cumulative effect requiring reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Patrick M. Meter
/s/ Pat M. Donofrio